

**Letter of Findings: 10-0368P**  
**Withholding Tax**  
**For the Tax Period Ending December 31, 2009**

**NOTICE:** Under IC § 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of the document will provide the general public with information about the Department's official position concerning a specific issue.

**ISSUE**

**I. Withholding Tax – Late Payment Penalty.**

**Authority:** IC § 6-8.1-5-1; IC § 6-8.1-10-2.1; [45 IAC 15-11-2](#).

The taxpayer seeks abatement of the penalty for late payment of employee withholding tax.

**STATEMENT OF FACTS**

The taxpayer is a limited liability company doing business in Indiana. The taxpayer remitted employee withholding tax after the statutory deadline for that payment. The Indiana Department of Revenue ("Department") issued a ten-percent penalty, which the taxpayer protested.

**I. Withholding Tax – Late Payment Penalty.**

**DISCUSSION**

The taxpayer argues that it is entitled to abatement of the penalty for late payment of withholding tax.

IC § 6-8.1-10-2.1 states in relevant part:

(a) If a person:

- (1) fails to file a return for any of the listed taxes;
- (2) fails to pay the full amount of tax shown on the person's return on or before the due date for the return or payment;
- (3) incurs, upon examination by the department, a deficiency that is due to negligence;
- (4) fails to timely remit any tax held in trust for the state; or
- (5) is required to make a payment by electronic funds transfer (as defined in [IC 4-8.1-2-7](#)), overnight courier, or personal delivery and the payment is not received by the department by the due date in funds acceptable to the department;

the person is subject to a penalty.

(b) Except as provided in subsection (g), the penalty described in subsection (a) is ten percent (10 [percent]) of:

- (1) the full amount of the tax due if the person failed to file the return;
- (2) the amount of the tax not paid, if the person filed the return but failed to pay the full amount of the tax shown on the return;
- (3) the amount of the tax held in trust that is not timely remitted;
- (4) the amount of deficiency as finally determined by the department; or
- (5) the amount of tax due if a person failed to make payment by electronic funds transfer, overnight courier, or personal delivery by the due date.

Under IC § 6-8.1-5-1(c), "The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." An assessment – including the negligence penalty – is presumptively valid.

Departmental regulation [45 IAC 15-11-2](#)(b) defines negligence as "the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer." Negligence is to "be determined on a case-by-case basis according to the facts and circumstances of each taxpayer." Id.

IC § 6-8.1-10-2.1(d) allows the Department to waive the penalty upon a showing that the failure to pay the deficiency was based on "reasonable cause and not due to willful neglect." Departmental regulation [45 IAC 15-11-2](#)(c) requires that in order to establish "reasonable cause," the taxpayer must demonstrate that it "exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed...."

The taxpayer provided information that it had an unusual set of circumstances which prevented it from paying withholding tax for the period in question. Beyond the periods in which the unusual set of circumstances occurred, the taxpayer has otherwise been compliant with its tax filing and tax payment duties. The taxpayer has provided sufficient information to justify penalty waiver for the protested period. While the taxpayer raised the same issues with regard to other tax periods and types, these taxes will not be addressed in this Letter of Findings; nevertheless, the taxpayer may seek appropriate relief permitted under Indiana law.

**FINDING**

The taxpayer's protest is sustained.

*Posted: 10/27/2010 by Legislative Services Agency*  
An [html](#) version of this document.